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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 662

GORDIE M. HERREN, PETITIONER

v.

FARM SECURITY ADMINISTRATION, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of the United States for the Western District of Arkansas are printed at R. 39-46. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is printed at R. 379-400.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on January 12,

1948 (R. 400-401). The petition for a writ of certiorari was filed on March 8, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner and another, as lessors, entered into an agreement leasing petitioner's farm to an incorporated cooperative association, as lessee, and giving that association and the United States options to purchase the land. In order to assure effective prosecution of the rural rehabilitation program in connection with which the association was organized and the agreement executed, and in order to protect its interests as creditor of the association and its sublessee members, the United States participated to some extent in their affairs. The question presented is whether the record supports the conclusion of the district court that the association was merely an agent of the Government and the Farm Security Administration the true lessee under the agreement, and whether, therefore, the United States is liable, in a suit under the Tucker Act, for breach of the covenant in the lease against waste.

STATEMENT

This suit was brought, under Section 24(20) of the Judicial Code (28 U.S.C. 41(20)), to recover damages from the United States for waste allegedly committed in violation of an agreement (R. 11-25) under which petitioner and the Southwest Joi: t Land Bank, as lessor, leased petitioner's farm to Ashley Homestead Association, Inc. ("Ashley"), as lessee, and gave Ashley and the United States options to purchase the land. The theory of the complaint is that Ashley was an agent and "device" of the Farm

Security Administration ("Farm Security");[1] that, in truth, Farm Security was the lessee; and that the United States was, therefore, liable in damages for breach of the lease agreement (R. 5-9).

The agreement in question was executed in connection with the rural rehabilitation program which had been undertaken by the Government pursuant to the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 185-186, 305-306). Pursuant to that Act, the President was authorized to expend monies for rural rehabilitation and relief in stricken agricultural areas, and, as part of that program, to finance the purchase of farm lands and necessary equipment by farmers (49 Stat. 115, 117). By executive order, these powers were delegated to Farm Security, and loans authorized to be made either to individuals or to *bona fide* cooperative associations (6 C.F.R. 301.1 *et seq.*).[2] In addition to financial aid, the program also con-

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[1] By the Farmers' Home Administration Act of 1946 (60 Stat. 1062), the Farm Security Administration, its functions, powers, and duties were abolished. The Farmers' Home Corporation established by the Bankhead-Jones Farm Tenant Act of 1937 (50 Stat. 522, 527) to be subject to the supervision of the Secretary of Agriculture and to perform his duties under that Act, was charged with the liquidation of Farm Security's functions.

[2] In the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (and the following Emergency Relief Appropriation Acts), Congress authorized the President to make loans to low-income farmers in stricken agricultural areas (Sec. 1); to acquire by purchase or by eminent domain any real property or any interest therein (Sec. 5); to establish the necessary agencies for the performance of these functions (Sec. 4); and to prescribe rules and regulations for their operation (Sec. 6). The President issued a number of executive orders creating and putting into operation the administrative agencies to which he delegated this authority. See Executive Order 7027, dated April 30, 1935; Executive Order 7028, dated April 30, 1935; Executive Order 7041, dated May 15, 1935; Executive Order 7083, dated June 24, 1935; Executive Order 7143, dated August 19, 1935; Executive Order 7200, dated September 26, 1935; Executive Order 7347, dated April 15, 1936 (1 F. R. 207); Executive Order 7396, dated June 22, 1936 (1 F. R. 651); Executive Order 7530, dated December

templated assistance in and supervision of the actual farming operations, so that the most modern agricultural methods might also be brought to the rehabilitation of the low-income farmer. See Hearings before the Select Committee of the House Committee on Agriculture to Investigate the Activities of the Farm Security Administration, 78th Cong., 1st sess., pursuant to H. Res. 119, pp. 982-984.

The Government's program provided for the leasing of small farms by individual farmers, to whom rehabilitation loans would be made, but in certain areas where landowners were reluctant to break up their large holdings into small units, the so-called land leasing program was found to be necessary (R. 185, 306). Under that program, Farm Security would help the individual farmers organize themselves into a cooperative association, which could then lease a large tract and subdivide it into individual family-type farms for subleasing to their members. Farm Security would help draft the documents for organization of the association and the lease agreement between the landowner and the association, would loan the money to the association to enable it to pay a year's rent in advance, and would aid in the subleasing arrangements. It would then, in turn, help the member sublessees by preparing individual farm plans and supervising their execution, and, where necessary, by making regular rehabilitation loans. Farm Security would continue thus to participate in the affairs of

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31, 1936 (2 F. R. 7). Executive Order 7027 established the Resettlement Administration and authorized the Administrator thereof to "acquire, by purchase or by the power of eminent domain, any real property or any interest therein and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein." Executive Order 7530 transferred the property, functions, and duties of the Resettlement Administration to the Secretary of Agriculture and made the Administrator of the Resettlement Administration subject and amenable to the Secretary of Agriculture. By Secretary's Memorandum 732, dated September 1, 1937 (2 F. R. 1800), the Resettlement Administration was changed to the Farm Security Administration.

the association and its members at least until the loans had been repaid.[3] In all, Farm Security aided in forming 52 land leasing associations, composed of 2,000 small farmers, leasing 136,386 acres of farm land (R. 300, 305-306, 309-310, 311-313, 317; also, see, Hearings on the Activities of Farm Security, *supra*, pp. 1001-1002; *Herren* v. *Farm Security Administration, etc.*, 153 F. 2d 76, 79, fn. 3).

Ashley, the lessee in this suit, was such a land-leasing cooperative association. It was incorporated on January 20, 1939, as a benevolent corporation, under Sections 2252-2261 of the Statutes of Arkansas (Pope's Digest, 1937 (R. 6, 194, 199). Its incorporators were farmers, and although for a time three Farm Security employees served on its Board of Directors, participating at meetings as advisors or consultants in order to assist the association in conducting its affairs from an educational standpoint and also to protect the interests of the Government, only one such director remained by 1943, and, thereafter, the practice of having a Farm Security employee on the Board was entirely discontinued (R. 300-301, 306-307). Two loans were made to Ashley by Farm Security, one on February 4, 1939, in connection with a lease of certain property known as the Wells property (R. 239-247), the other on May 7, 1940, in connection with the lease of the Herren property (R. 247-255).[4] These loans were made, in accordance with the

[3] Since meetings of Ashley were called at the direction of the Farm Security supervisor (R. 132), notices were sent out from his office (R. 150); he was in charge of the meetings, kept the minutes, typed them out and brought them around for Ashley's officers to sign (R. 131); and where personal loans were made to the members, each executed notes and a chattel mortgage on all his personal property to the Government (R. 122, 151-152); it is understandable why some, though they had entered into leases with Ashley (R. 121-122, 134, 152), were under the impression that they were renting their farms from and working them for Farm Security (R. 151) and that the Farm Security supervisor "managed" the properties (R. 131-133).

[4] This latter, the lease here in question, was executed on or about January 1, 1940 (R. 11). Petitioner testified that she dealt only with Farm

established administrative procedures, only after Ashley had submitted applications accompanied by numerous exhibits to show that it was a *bona fide* cooperative association (R. 189-226); an economic justification for the loan had been prepared (R. 264-266); the loan had been approved by the Administrator of Farm Security and the Secretary of Agriculture (R. 266); and authority had been given to the regional director of Farm Security to execute the loan agreement on behalf of the Secretary of Agriculture (R. 261). Appropriate loan agreements between the United States and Ashley were then executed (R. 239-257), mortgage notes in favor of the United States signed by Ashley (R. 257-260), and a chattel mortgage to teh United States executed and filed (R. 267-272).

On October 31, 1944, petitioner filed a petition in the Ashley County Chancery Court of the State of Arkansas, naming as defendants, among others, Ashley and Farm Security and praying for judgment in the amount of $2,500 for rental due for the year 1944 and $10,000 for breach of the covenant of the lease against waste (R. 334-343). An injunction to enjoin prosecution of the action against Farm Security was, however, sought and procured in the United States District Court for the Western District of Arkansas, Eldorado Division (Civil No. 248). Petitioner, nevertheless, continued the action against Ashley, and the Chancery Court held her entitled to recover $2,500 as rentals for 1944

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* Security employees and saw the signatures of Ashley's representatives only after execution when a copy of the agreement was sent to her; she didn't know then why the signatures were there (R. 79-82, 84). Nevertheless, all rental checks received and endorsed by petitioner, though countersigned by Farm Security representatives, were signed by Ashley's officers (R. 88-93). And petitioner's college-educated son, who represented her in all the negotiations culminating in the lease, carefully studied a model lease agreement where the lessee was an association, before his mother executed the present agreement, and signed a letter on her behalf stating her "understanding that this is to be a five-year lease between Ashley County Homestead Association and me" (R. 98, 105-107, 109-110).

and simultaneously ordered the liquidation of Ashley, pursuant to the prayer of another petition pending before it (R. 329-333). On May 15, 1945, noting that petitioner and her attorney had been "fully paid, and there is on hand in the register of this court for distribution • • • the total sum of $3,403.76," the court ordered the distribution of that money to the Ashley members (R. 360-362).

On February 13, 1945, petitioner instituted the present action, praying judgment for damages in the amount of $10,000 against respondent for waste in violation of the lease covenant (R. 5-9). On respondent's motion to dismiss and for summary judgment (R. 28), the district Court ordered dismissal of the complaint, holding that the United States was not suable on contracts of the Farm Security Administration (R. 29; *Herren* v. *Farm Security Administration, etc.*, 60 F. Supp. 694). On appeal to the court below, that court, reserving decision on the question whether the Farm Security Administration contracted against waste in the instant case, held that the United States was suable on such contracts and that an action for breach of a covenant against waste sounds in contract and not in tort. Accordingly, the judgment of the district court was reversed, and the cause remanded for further proceedings (R. 31-32; *Herren* v. *Farm Security Administration, etc.*, 153 F. 2d 76).

A hearing on the merits was thereafter had on June 26-27, 1946, before the district court sitting without a jury, and testimony and documentary evidence were received on behalf of petitioner and respondent (R. 47-364). At the close of the trial, the court stated that in its opinion Ashley was acting as an agent of Farm Security and was under the complete control and domination of Farm Security (R. 364-369), and on October 14, 1946, the court entered its findings of fact and conclusions of law, reiterating that statement and, in addition, concluding that the Secretary of Agricul-

ture had the power to lease land here involved through the device of a corporate agent; that that power was delegable; that it had indeed been delegated to the regional director of Farm Security who had signed the agreement on behalf of the Government; and that by virtue of these facts the United States had become liable for the performance of the lease according to its terms (R. 41-45). Accordingly, since the court found that the covenant against waste had been breached, it assessed damages against the United States in the amount of $9,500, with interest and costs (R. 46). The Government's motion for amendment of the findings of fact and for additional findings was overruled on October 28, 1946 (R. 369-372).

On appeal to the court below, the judgment of the trial court was reversed, with directions to dismiss the complaint (R. 400-401).

ARGUMENT

The court below concluded that there was no evidence in the record to support the district court's conclusion that the Government had bound itself by contract to pay damages for waste to petitioner's leased farm and no rational basis for inferring such a contract (R. 391, 400). In the absence of such a contract, the district court had no jurisdiction and should have dismissed the suit. *United States* v. *Sherwood*, 312 U. S. 584, 586; *Minnesota* v. *United States*, 305 U. S. 382, 387-388; *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217. The holding of the court below is so clearly correct that further review by this Court is not warranted.

1. In accordance with the theory of petitioner's complaint, the district court held that Ashley, though an independent corporation, duly organized under the laws of Arkansas, was in reality "a device created by * * * Farm Security * * * for its convenience in making the

lease and in carrying out operations * * * simply a contractual designation through which * * * Farm Security * * * took possession of the land, and controlled and operated the farm during the term of the lease. * * * " (R. 44). But, as the court below remarked (R. 382-391), all the transactions here, when viewed in the perspective of the entire rural rehabilitation program, of which they were a part, are quite consistent with a debtor-creditor relationship. The supervision and control which Farm Security exercised over Ashley and its member sublessees were not those of a principal with respect to his agent. The Government was acting rather as a creditor and the proponent of the national rural rehabilitation program. Farm Security participated in the affairs of Ashley and its sublessees because it was essential that Ashley function properly and that its members fare well; only in that way would Ashley effectively render the service for which it had been created, and would the association and the individual farmers repay the loans which Farm Security had made to them.

Thus, the requirements that Ashley deposit its funds in a bank approved by Farm Security, that it not withdraw them without the countersignature of a Government designee, that it file reports, limit its membership, and keep books available for Government inspection, were all conditions of the loan agreement deemed necessary "for the protection of the Government's interests" (R. 288). The loan agreement did provide, further, that if Ashley failed to live up to the terms of the agreement, the Government could take over and actively manage the corporation (R. 252), but that contingency did not occur. Moreover, supervision and guidance in the conduct of Ashley's affairs by Farm Security employees was necessary in view of the lack of familiarity of Ashley's members with the forms and procedures relating to corporate management; and the only

reason for having Farm Security employees on the association's board of directors was "the fact that the Association gave a loan agreement to the government which was for the protection of the government's interest, and realizing that these farmers were not versed in carrying on the affairs of the assoc tion, it was fully justified under the loan agreement, until they could have some training in carrying on their own affairs" (R. 287-288).

In short, Farm Security's participation in Ashley's affairs and in those of its members was no greater than that often indulged in by creditors in the business of their debtors, and it does not justify the imposing of Ashley's liabilities on the Government. Even where the relationships between creditor and debtor have been closer and more direct, the courts have refused to impute liability to the creditors for the obligation of the debtors. *Chicago Mill & Lumber Co. v. Boatmen's Bank,* 234 Fed. 41 (C.C.A. 8); *Owl Fumigating Corp.* v. *California Cyanide Co.,* 30 F. 2d 812 (C.C.A. 3).[5]

2. Furthermore, as the court below held, "it is clear from the face of the lease that the United States did not intend to bind itself thereon as the lessee, but was interested only in securing an option to purchase the property, and to

[5] Land-leasing corporations such as Ashley are not to be confused with the defense relocation corporations, which employees of the Farm Security Administration were authorized to create. See Hearings on the Activities of Farm Security, *supra,* pp. 1138-1153; cf. Section 3, Farmers' Home Administration Act of 1946 (60 Stat. 1062). It was in regard to the Secretary of Agriculture's power to authorize his employees to create defense relocation corporations that the disagreement between the Comptroller General and the Attorney General, to which petitioner alludes, occurred. See Pet. 16, 21-23; Hearings, *supra,* pp. 1140-48, 1150. So far as land-leasing associations are concerned, such as that here involved, the power of employees to create such organizations is irrelevant; the Secretary of Agriculture at no time authorized their creation by government employees, and the record here is bare of any indication that such authorization was given or that any such corporation was created by federal employees.

assure that Mrs. Herren had a proper title to the property" (R. 394). The lease mentions the United States in only a few places. In enumerating the parties, petitioner and the Southwest Joint Stock Land Bank of Little Rock, Arkansas, are expressly designated "the 'Lessors'," and Ashley "the 'Lessee';" the United States, acting by and through the Secretary of Agriculture, is merely referred to as "the 'Government' " (R. 11). Paragraph 5(a) provides that "the Government, or the Lessee, * * * shall have an exclusive and irrevocable option, at any time prior to December 31, 1941, to purchase said property upon the following terms and conditions * * *" (R. 12), whereas paragraph 5(b) vests in the United States, in case it exercises the option, "the right to terminate this lease as of the end of any calendar year by giving written notice of such termination to the Lessee at least Ninety (90) days before the end of such year * * *" (R. 14). Further mention of the United States appears in paragraph 10(a), which permits the "Lessee" to sublet all the property to any tenant "upon first receiving the written consent of the Government thereto" (R. 17), and paragraph 10(b) permits the "Lessee" to sublet any part of the property "without first receiving the consent of the Government" (R. 17). Paragraph 11(b) obligates the "Lessors" to furnish the Lessee "with evidence of title in it satisfactory to the Government" (R. 18), whereas paragraph 12 provides that "all rights, privileges, benefits, options and powers conferred herein on the Government may be exercised on its behalf by the Secretary of Agriculture, or by the head of any other agency of the Federal Government that may from time to time be vested with authority over the subject matter of this lease, or by the duly authorized representative of either of them" (R. 18).

If Ashley had been merely a contractual designation or an agent for the United States and the Government had in-

tended to assume the obligations of the lease, there would have been no purpose in distinguishing meticulously between the United States and Ashley. Nevertheless, each time the United States is mentioned in the lease, it is in order to give it rights which were separate and distinct from Ashley's. There would have been no purpose in reserving two separate options to purchase the property, one for the United States and one in favor of Ashley, nor in making Ashley's right to exercise its option dependent on the approval of the Government, if Ashley had been acting for the Government, since, in that event, a reservation of a single unconditioned option in favor of the lessee would have been sufficient. Nor would there have been any purpose in reserving the right to the United States, once it should have exercised its option, to terminate the lease on 90 days' notice, for if Ashley had been its contractual designation, *i.e.*, if the United States and Ashley had been one and the same, the purchase of the property by the United States would have merged the lease with the title. Furthermore, there would have been no need to condition the subletting of all the property upon the written consent of the United States, nor to permit the leasing of any part thereof without the consent of the United States.

Finally, it is clear from the face of the lease that the United States did not intend to bind itself as lessee, and since it is a well-established principle of contract law that those who are parties to a contract and are bound by it are to be ascertained by an inspection of the document, the provisions of which being controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded, it follows that petitioner's claim was properly rejected. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; see, also, *Waterman Steamship Co.* v. *Land*, 151 F. 2d 292, 296 (App. D. C.), reversed on other grounds

sub nomine Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540; *Anson on Contracts* (Corbin's 3rd Ed. 1919) § 275 *et seq.*; cf. *Hodgson* v. *Dexter*, 1 Cr. 345.

3. The court below adverted to one further consideration why the United States cannot be held liable under the covenant in the lease (R. 395-399). Neither the regional director of Farm Security, who signed the agreement for the Government, nor any other employee of the agency was authorized to enter into a lease of petitioner's farm for the United States, whether in its own name or in the name of Ashley. And, since persons dealing with an agent of the United States are charged with notice of the limitations on his authority and the United States is bound only by the acts of its agents which are within their authority (*Federal Crop Insurance Co.* v. *Merrill*, 332 U. S. 380; *Wilber National Bank* v. *United States*, 294 U. S. 120, 123; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *City & County of San Francisco*, 310 U. S. 16, 32; *United States* v. *North American Co.*, 253 U. S. 330), the question of Ashley's relationship to the Government becomes wholly irrelevant.

There is no support for the district court's holding that Ashley was in fact authorized to lease the land for the Government (R. 45). The telegraphic authorization (R. 396) from the Administrator of Farm Security to the regional director who signed the lease for the Government, to which the district court referred (R. 45), did not authorize him or anyone else to bind the United States as lessee, as the court below correctly held (R. 398). When considered side by side with the request for authorization to which it was the reply (R. 397), it is plain that it was intended solely to permit approval of the agreement as a basis for the loan of money to Ashley, and in no respect to permit obligating the United States as lessee.

4. Finally, in holding that Ashley was the "device" of, and a "contractual designation" and "corporate agent" for Farm Security and that Farm Security was the real lessee of the Herren property, the district court, in effect, disregarded the concededly separate corporate entity of Ashley. Whatever the propriety of piercing the corporate veil where the corporate entity has been used "to work fraud or injustice" (*Taylor* v. *Standard Gas Co.*, 306 U. S. 307, 322), such an equitable procedure cannot be used to impose Tucker Act liability on the United States. In the present case, there is no fraud.[6] Moreover, it should be noted that, in any event, the authorities are in agreement that all or a majority of the stock ownership of the subsidiary by the parent or a complete identity of stock ownership is a *sine qua non* of such piercing (Douglas and Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L. J., 193, 196); the United States, however, had no ownership of Ashley whatsoever, and when its assets were distributed upon its liquidation, it was not to the United States that the money went, but only to its farmer members (R. 360-362).

Moreover, piercing the corporate veil of Ashley would not support the finding of a contract with the United States. The principles governing the disregard of the corporate entity are broad equitable principles, and the existence *vel non* of a real contract is irrelevant, since the imposition of liability on the person reached by the piercing of the veil does not depend upon contract principles; indeed, if contract principles were applicable, there could in all probability be no piercing of the veil. See Douglas and Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L. J. 193, 210-211; *Weisser* v. *Mursam*

[6] As a matter of fact, petitioner's counsel expressly denied that her claim was based on any claim of fraud (R. 86).

Shoe Corp., 127 F. 2d 344 (C.C.A. 2); *Majestic Co.* v. *Orpheum Circuit*, 21 F. 2d 720 (C. C. A. 8); *Kingston Dry Dock Co.* v. *Lake Champlain Trans. Co.*, 31 F. 2d 265, 267 (C. C. A. 2); *Gillis* v. *Jenkins Petroleum Process Co.*, 84 F. 2d 74 (C. C. A. 9). Since piercing the corporate veil of Ashley to reach the United States would not support the finding of a contract, express or implied in fact, between petitioner and the United States, there is no basis on which to allow recovery against the United States under the Tucker Act. *Goodyear Co.* v. *United States*, 276 U. S. 287, 293; *Sutton* v. *United States*, 256 U. S. 575, 581; *Merritt* v. *United States*, 267 U. S. 338, 341; *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217; cf. *Public Water Supply Dist. No. 6* v. *United States*, 66 F. Supp. 66 (W. D. Mo.).

CONCLUSION

The judgment of the court below is clearly correct, and there is no conflict of decisions. Further review by this Court is not warranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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